Office-Supreme Court, U.S.
FILED
AUG 31 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-190

IN THE

Supreme Court of the United States

October Term, 1984

WINDJAMMER "BAREFOOT" CRUISES, LTD.,
Petitioner,

vs.

RUSSELL KUNTZ, Administrator of the Estate of CHRISTINE ANN KUNTZ, Deceased,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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8 pp

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Counterstatement of the Question Presented

I. Whether a claim brought under a state survival act can be joined with a federal maritime wrongful death action?

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Summary of Argument

The Petition for a Writ of Certiorari should be denied because the question which it presents was recently answered by this Court. The question presented is whether a claim under the Pennsylvania Survival Act can be joined with a wrongful death claim brought under the Death on the High Seas Act (DOHSA), 46 U.S.C. §761, *et seq.* In *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974), the Court stated that a survival action brought under a state statute can be joined with a maritime wrongful death action. Thus, the issue which the petitioner seeks to bring before the Court is neither novel nor unsettled, and therefore does not merit a Writ of Certiorari.

I. The Petition for a Writ of Certiorari should be denied because the question of whether a claim brought under a state survival statute can be joined with a maritime wrongful death action was recently answered by this Court.

The only reason which the Petitioner has set forth for granting a Writ of Certiorari is its assertion that it is unsettled whether the Death on the High Seas Act is a wrongful death statute which does not preclude a separate state survival action on behalf of a decedent. In *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974), however, the Court specifically answered this question. As to whether the Death on the High Seas Act is merely a wrongful death statute, the Court stated:

> Wrongful death statutes are to be distinguished from survival statutes. The latter have been separately enacted to abrogate the common-law rule that an action for tort abated at the death of either the injured person or the tortfeasor. Survival statutes permit the deceased's estate to prosecute any claims for personal injury the deceased would have had, but for his death. They do not permit recovery for harms suffered by the deceased's family as a result of his death . . . The Federal Employers' Liability Act, 45 U.S.C. 59 and the Jones Act, 46 U.S.C. 688, *but not the Death on the High Seas Act*, 46 U.S.C. 761-768 *contain survival provisions.* (emphasis added).

414 U.S. at 575 N. 2

Having recognized that a survival action is a separate and distinct remedy, the Court stated that a maritime wrongful death action can be joined with a claim brought under a state survival action.

> Of course, the maritime wrongful-death remedy is an admiralty action ordinarily tried to the court and

> not a jury. There are instances, however, where the admiralty action may be joined with a civil claim, for example, a claim based upon the Jones Act, see *Morange*, 398 U.S. at 396 n. 12, 90 S.Ct., at 1785; *Peace v. Fidalgo Island Packing Co.*, 419 F. 2d 371 (CA9 1969), or a state survival statute, see *Dugas v. National Aircraft Corp.*, 438 F. 2d 1386 (CA3 1971); *Petition of Gulf Oil Corp.*, 172 F. Supp. 922 (SDNY 1959); cf. *Kernan v. American Dredging Co.*, 355 U.S. 426, 430 n. 4, 78 S.Ct. 394, 397, 2 L.Ed.2d 382 (1958), and a jury trial may be requested.

414 U.S. at 589, n. 24

The Court's citation to *Dugas v. National Aircraft Corp.*, 438 F. 2d 1386 (CA 3 1971), is significant to the instant petition because the *Dugas* decision is the basis for the Court's award of damages in the within case under both the Death on the High Seas Act and the Pennsylvania Survival Act. *Dugas*, which involved facts virtually identical to those of the instant case, held that the estate and survivors of a Pennsylvania resident who perished in Bahamian waters could claim damages under both the Death on the High Seas Act and the Pennsylvania Survival Act. The reasoning and holding of the *Dugas* decision has been adopted by the Courts of Appeals for the Fourth, Fifth and Eighth Circuits, and numerous district courts, as well as having been approved by this Court. *See, e.g., Dennis v. Central Gulf Steamship Corporation*, 453 F. 2d 137 (5th Cir. 1972); *Solomon v. Warren*, 540 F. 2d 777 (5th Cir. 1976), *rehearing denied*, 545 F. 2d 1299 (5th Cir. 1976), *cert. denied*, 434 U.S. 801 (1977); *Spiller v. Thomas M. Lowe, Jr. and Associates, Inc.*, 466 F. 2d 903 (8th Cir. 1972); *McKeithen v. M/T Frosta*, 435 F. Supp. 584 (E.D. La. 1977).

Contrary to the petitioner's assertions, the instant case does not present an unsettled question of federal law. The issue of whether a claim under a state survival statute can be joined with a maritime wrongful death action has been answered affirmatively by this Court. Petitioner's statement that this question was left unanswered by the decision of *Mobil Oil Corporation vs. Higginbotham*, 436 U.S. 618 (1978) is inaccurate. The sole issue in *Higginbotham* was whether certain items of damage are recoverable in a maritime wrongful death action, and the Court was therefore not presented with, and did not discuss, maritime survival actions. The Court did, however, state that "there is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." *436 U.S. at 625.* Because the Death on the High Seas Act is merely a wrongful death statute which provides no survival remedy to the decedent's estate, this Court in accordance with admiralty's long established tradition of granting the most equitable relief, has recognized the joinder of a state survival claim with a maritime wrongful death action as a means of filling the legislative void. Since the petitioner has presented no reason for the Court to reconsider its pronouncement on this issue, it is respectfully submitted that its Petition for Writ of Certiorari should be denied.

Conclusion

For the above-stated reasons, this Honorable Court is respectfully requested to enter an Order denying the Petition for Writ of Certiorari of the Petitioner, Windjammer "Barefoot" Cruises, Ltd.

Respectfully submitted,

EDWARD J. BALZARINI
Attorney for Respondent